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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 699 1903 25.

THE CALIFORNIA REDUCTION COMPANY ET AL.,
PETITIONERS,

vs.

THE SANITARY REDUCTION WORKS OF SAN FRANCISCO, RESPONDENT.

BRIEF ON BEHALF OF PETITIONERS IN SUPPORT OF APPLICATION TO THIS COURT FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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STATEMENT OF THE CASE AND ARGUMENT.

This suit was commenced to enforce an ordinance of the city and county of San Francisco—the existence and validity of the ordinance being called into question—whereby there was granted to the assignor of complainant the *exclusive* privilege to receive and reduce by incineration, *for a period of fifty years*, all house refuse, butchers' offal, garbage, refuse, dirt, ashes, sludge, crockery, tins, cinders, bones, other

like matter, dead animals, putrid vegetable matter, and fish, flesh, or food condemned by the board of health as unfit for human food, found within the city and county of San Francisco.

By the terms of the ordinance (Record, p. 9) all the substances named are required to "be forthwith delivered to the crematory herein provided for, and there, at the expense of the person or corporation so conveying the same, be cremated or destroyed," etc. (Record, foot of page 12).

The price required to be paid for the cremation or destruction of the substances named is twenty cents per cubic yard (Record, p. 11).

The circuit court for the northern district of California obtained jurisdiction by reason of diversity of citizenship. The complainant was a California corporation. The California Reduction Company was a Colorado corporation, organized for the purpose of removing from San Francisco, by boats and barges, house refuse and garbage for destruction beyond the municipal limits. The other defendants, about 140 in number, are subjects of the King of Italy, and pursue the occupation of scavengers in San Francisco, "*and about half a dozen of them are shown to be householders in the city of San Francisco*" (Record, p. 737).

In its opinion upon an application for an injunction *pendente lite*, the circuit court upheld the ordinance in question, under an act of the legislature of California (Stats. Cal. 1893, p. 288) regulating the sale of franchises.

This act read as follows:

> "An act providing for the sale of railroad and other franchises in municipalities, and relative to granting of franchises (approved March 23, 1893).
>
> "The people of the State of California, represented in senate and assembly, do enact as follows:
>
> "SECTION 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or

operate railroads along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by the board of supervisors, common council, or other governing or legislative body of any county, city and county, city, town or district within this State, shall be granted upon the conditions in this act provided, and not otherwise. The fact that an application for such franchise or privilege has been made to such board of supervisors, common council, or other governing or legislative body, together with a statement that it is proposed to grant the same, must first be advertised in one or more daily newspapers of the county, city and county, city, town or district wherein the said franchise or privilege is to be exercised. Such advertisement must continue every day for at least ten days, and must commence at least thirty days before any further action of the board of supervisors, common council, or other governing or legislative body. The advertisement must state the character of the franchise or privilege proposed to be granted, the terms of its continuance, and, if a street railroad, the route to be traversed, and the day on which tenders will be received for the same. On the day so stated, the board, or other governing or legislative body herein mentioned, must meet in open session and read the tenders. The franchise or privileges must then be awarded to the highest bidder: *Provided, however*, That nothing in this section shall affect a special privilege granted for a shorter term than two years.

"SECTION 2. Any member of any board of supervisors, common council, or other governing or legislative body of any county, city and county, city, town or district of this State, who, by his vote, violates or attempts to violate the provisions of this act or any of them, shall be guilty of a misdemeanor and of malfeasance in office and be deprived of his office by the decree of a court of competent jurisdiction, after trial and conviction.

"SECTION 3. This act shall take effect immediately."

Subsequent to the granting of the preliminary injunction, issue was joined and the case tried. Judgment passed for the complainants, and thereupon the respondents (petitioners here) prosecuted an appeal to the circuit court of appeals for the ninth circuit.

The petitioners here claimed in the circuit court of appeals that the ordinance was in no sense a franchise, but a mere monopoly of a hitherto common right, and if sustained at all, could only be sustained as a contract or a grant of monopoly under the police power.

In support of their position, that the ordinance in question was in no sense a franchise, the petitioners cited Bank of Augusta *vs.* Earle, 13 Peters, 595; People's Railroad *vs.* Memphis Railroad, 10 Wall., 51; California *vs.* Pacific Railroad Co., 127 U. S., 40.

They furthermore cited State *vs.* Green, 112 Ind., 462; 14 N. E., 352, in which it was decided that a physician's license is in no sense a franchise, although criminal for any person to exercise the calling of a physician without a license, and People *vs.* Matthews, 53 Ill. App., 305, wherein it was decided that the right to license the traffic in intoxicating liquors is found in the police power of the State, and that a license granted thereunder does not come within any definition of a franchise.

The circuit court of appeals did not uphold the ordinance as a franchise, but upheld it as a contract under the police power, leaving open, however, the question whether it could not also be upheld or maintained as a franchise.

The court said (Record, p. 757):

> "Inasmuch as we have arrived at the conclusion that the rights and privileges conferred by the board were constitutional and valid in the proper exercise of the police power of the State, and could be sustained as a contract, it seems t us unnecessary to further discuss the question whether it could also be upheld and maintained as a franchise."

In support of our application for a writ of certiorari, we rely upon the following propositions:

I. Considered either as a franchise or a contract under the police power, the ordinance here involved is a violation of the fourteenth amendment, for the reason that for a period of fifty years it deprives the householders of San Francisco of property of commercial value by transferring that property to the respondent, and this without requiring compensation to be made.

II. Conceding the ordinance here involved to be in all other respects constitutional and valid, it is nevertheless invalid for the reason that there is no authority of law whatever to sustain the provision therein contained which requires the householders of San Francisco to pay twenty cents per cubic yard for the reduction of the substances taken from them and given to the respondent by the ordinance here involved.

III. Considered either as a contract under the police power or as a franchise, the ordinance here involved never had any legal existence for the reason that it was never lawfully enacted.

IV. Considered as a franchise, the ordinance is invalid for want of power to grant the franchise and for a violation of the prescribed mode in the granting thereof, if there were power to grant the same.

V. Socialism has not become so dominant a principle in the police power that the State can assume or farm out a monopoly of all of the occupations subject to regulation under the police power.

I.

CONSIDERED EITHER AS A FRANCHISE OR A CONTRACT UNDER THE POLICE POWER, THE ORDINANCE HERE INVOLVED IS A VIOLATION OF THE FOURTEENTH AMENDMENT, FOR THE REASON THAT FOR A PERIOD OF FIFTY YEARS IT DEPRIVES THE HOUSEHOLDERS OF SAN FRANCISCO OF PROPERTY OF COMMERCIAL VALUE BY TRANSFERRING THAT PROPERTY TO THE RESPONDENT, AND THIS WITHOUT REQUIRING COMPENSATION TO BE MADE.

In the circuit court of appeals we claimed (Record, p. 742, pt. 13) that the ordinance here involved was "invalid because it deprives the owner thereof of property of commercial value without any necessity and without compensation."

This point is stated by the court as one of the propositions upon which we relied, but the proposition is nowhere considered in the opinion of the court.

We submit that the ordinance does deprive the householders of San Francisco of property without any compensation.

The ordinance makes it obligatory upon every inhabitant of the city and county of San Francisco to forthwith deliver to the complainant, for reduction and retention by it, all house refuse, butchers' offal, garbage, refuse, dirt, ashes, sludge, crockery, tins, cinders, bones, other like matter, dead animals, putrid vegetable matter, and fish, flesh, and food that may be condemned by the board of hea'th as unfit for human food, and to pay twenty cents per cubic yard for the reduction of all of the enumerated substances.

There is no opportunity under this ordinance for any householder in San Francisco who may generate any of these substances, and who is, therefore, the owner of them, to make any disposition of them whatever. He is required by the ordinance to deliver them to the complainant for reduction

and retention, and he is forbidden (and among those who are so forbidden are the six petitioners who are householders in San Francisco) to convey any of these substances beyond the limits of the city and county of San Francisco.

It is therefore clear beyond discussion that for fifty years all property in the substances named is required to be surrendered by the inhabitants of San Francisco to the complainant.

Indeed, the obligation is not limited to the surrender, for by the terms of the ordinance the householder must pay twenty cents per cubic yard for the reduction of the property surrendered.

Nor can it be claimed that the articles required to be surrendered have no value whatever. It is shown in the proofs that a number of the substances mentioned are not only of value, but that they have a commercial value and are subjects of quotation in the daily fluctuating market reports, as, for instance, bones.* This is likewise true of broken crockery and tins. It is likewise true of house refuse as distinguished from garbage. It is decided in Alpers *vs.* San Francisco, 32 Fed., 506, that it is likewise true of dead animals.

Furthermore, it is expressly alleged in the bill of com-

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*The invalidity of the ordinance here in question, upon the ground that it involved the confiscation of property, was asserted by the petitioners in their answer to the bill of complaint (pages 63, 71, 102, 117, 118, 119, 120). This point is made the subject of an assignment of error by petitioners (Record, pages 687, 688, 689, 690, 692, 694, 695, 696, 697, 699, 720, 721). The following witnesses gave testimony upon the subject: Behrend Joost (pages 184, 203, 225, 226, 227, 228, 230, 231, 232, 233, 234, 248); M. D. Levenson (pages 250, 256, 257–260, 261, 264, 268); L. R. Ellert (page 213); Luigi Ferrari (page 272); D. Picetti (page 290); Frederick Minatti (page 298); Frederick Boicello (page 309); Guiglermo Varno (page 325). See also Exhibit "A," Record, page 184, and Complainant's Exhibit "D," page 528.

plaint that the substances mentioned in the ordinance "*are of value as articles of commerce.*"

The language is (Record, p. 32):

> "And your orator further shows unto your honors that *portions* of *all* of the garbage and other materials mentioned and described in said orders, ordinances and resolutions, *are of value as articles of commerce*, after being treated and reduced by your orator by processes both of reduction and incineration, which said articles of commerce when so reduced and incinerated, are and have been heretofore sold and disposed of by your orator at a profit, and in this way it has derived a revenue and is remunerated for a portion of the labor and expense incurred by it in incinerating and cremating the garbage and refuse matter, with which said articles of commerce are mixed and combined."

It will therefore be seen that it is an undisputed fact that the householders of San Francisco are required to surrender to the complainant all of the substances specified in the ordinance, *including portions thereof which are of value as articles of commerce.*

Nor is the value of this property so confiscated trifling in amount. On the contrary, the record shows that it has large value, which will obviously grow greater with the years. The complainant commenced business as a reduction company November 1, 1897. In the two months following its gross receipts amounted to $7,010.45 (Record, p. 27). This was equivalent to a gross annual income of $42,062.70. According to the testimony of the president of the complainant, the average amount of house refuse, &c., generated in San Francisco at the time he gave his testimony, which was in 1899, was 500 loads per day (Record, p. 208, Q. 24). Of this amount, according to the testimony of the president of the corporation, 250 loads per day were being diverted from the complainant (Record, p. 209, Q. 27). The diversion involved a loss of *profits* of $2,000 a month (Record, p. 209,

Q.'s 28 to 32). This testimony was given March 28, 1899 (Record, p. 178). During the year 1898 the gross receipts were $46,584.20 (Record, p. 586).

It is therefore evident that it cannot be claimed that the substances required to be delivered to the complainant are of inconsequential value and cannot be made the subject of commercial transactions or of profits in amounts which are of consequence. Under these circumstances we submit that the ordinance is a substantial violation of the fourteenth amendment.

In State *vs.* Robbins, 124 Ind., 308; 24 N. E., 978, there was involved the ordinance providing for the destruction of gaming devices. It is declared in the opinion that "unless, "therefore, the articles seized are of such a character that "the law will not recognize them as property, entitled as "such to its protection *under any circumstances*, they cannot "be summarily destroyed without affording the owner an "opportunity to be heard upon the subject of their lawful "use."

In a number of cases bearing very close analogy to the case at bar it is decided that ordinances like that here involved are unconstitutional because they involve a confiscation of property.

It is so decided in the following cases:

Meyer vs. Jones (Ky.), 49 S. W., 809 (1899).

Iler vs. Ross (Neb.), 90 N. W., 961; 57 L. R. A., 895 (1902).

River Rendering Co. vs. Behr, 77 Mo., 91; 46 Am. Rep., 8.

Knauer vs. City of Louisville, 45 S. W., 510 (Ky., 1898).

State vs. Morris, 47 La. Ann., 1684; 18 So., 710.

Underwood vs. Green, 42 N. Y., 140.

Schoen vs. The City of Atlanta, 97 Ga., 697; 25 S. E., 380.

Gregory vs. Mayor, 40 N. Y., 273.

In order that it may be made manifest that these cases decide the point to which they are cited, we have taken the following extracts from some of them:

Meyer vs. Jones:

"A city ordinance providing for the removal of carcasses of dead animals, and fixing charges therefor, is void *unless it gives the owner of a dead animal the right to remove it, or have it removed,* within a prescribed time before the public contractor takes charge thereof."

Iler vs. Ross:

"Many other substances coming within the meaning of the language of the ordinance in the nature of *debris*, rubbish, and other waste material which might be specifically mentioned, *could probably be used for some beneficial purpose*, and many others having no utility like those referred to are not within themselves nuisances and a menace to the health of the public. *It is quite true their accumulation in unreasonable quantities and for an unreasonable length of time would render them nuisances, and to prevent which all reasonable regulations may be imposed.* * * *

"*Not only is the owner's property taken from him when he could perhaps dispose of it* or make arrangements for its disposal to some advantage, *but he is compelled to bear the expense of the taking.* We cannot believe such an ordinance can be justified and upheld by the application of any sound principle of law."

In *River Rendering Co. vs. Behr*, 77 Mo., 91 (S. C., 46 Am. Rep., 6), an ordinance and franchise similar in principle to the one in the present case authorized the rendering company to remove and appropriate all carcasses of animals found in the city of St. Louis and not slain for food, *without preserving to the owner any right to first dispose of the carcass.* The principle now contended for was recognized by the court in the following language:

"The ordinance in question cannot be maintained as a police regulation. It can never be necessary to take from one man his property and give it to another, until the property is in such condition that it is, or is so used that it is likely to become a nuisance; and even in the latter case, until it has become a nuisance, *an opportunity should be given the owner to change the use, or make such disposition of his property as will prevent the apprehended danger.* * * *

"By this ordinance, as construed by the two courts which have passed upon it, the property of A, in his dead hog, or bullock, is transferred to B, without the intervention of courts or juries, and with no formality whatever, except a notice from the police department of the city, that the hog or bullock is dead, and is to be found at a given place, which may be on the owner's premises in his own possession. The ordinance does not declare that all dead animals found in the city, not killed for human food, are nuisances, and if it did, such a provision could not be upheld. A dead hog, or steer or sheep is not *per se* a nuisance. It was so ruled by the New York court of appeals in *Underwood vs. Green*, 42 N. Y., 140. It was there observed that: 'A dead hog is not *per se* a nuisance, even though it died of suffocation, and is not necessarily dangerous to public health. The owner may still put it to a useful and innocent purpose.' While a dead animal is not *per se* a nuisance, it may become so, and the city, under her charter, may pass such ordinances as are necessary to prevent it from becoming a nuisance, *but she must in such legislation pay a proper regard to the rights of the owner of such property.*

"*The death of a domestic animal does not terminate the owner's property*, and while he may be required to make such use or disposition of the carcass as will prevent a nuisance, stench or other inconvenience to the neighborhood, the municipal authorities cannot arbitrarily deprive him of his property by giving it to another."

In *Knauer vs. City of Louisville* (Kentucky), 45 S. W. Rep., 510, a public contractor was, by ordinance, given the exclu-

sive privilege of removing the carcasses of dead animals. The owner could direct the disposition of the carcass by paying the public contractor certain fees, which fees were found to be practically prohibitory. The court say:

> "The sole question in this case is whether the city can pass an ordinance which fixes the fees to be paid to the public contractor for the removal of the carcasses of dead animals out of the city at such sums that their owners cannot pay them and realize anything out of them. Can the city in this indirect way confiscate the property of its owner and give it to the public contractor? Dead animals are not *per se* nuisances, and the owner's property rights do not cease at the death of the animal. Until such becomes a nuisance, the owner should have the right to realize whatever he can from it. Under the police power, the municipality certainly has the right and it is its duty to prevent carcasses of dead animals from becoming nuisances; *and to that end it may prescribe the manner of and the time in which the owners shall remove or permit them to be removed.* The employers of the appellant can remove the carcasses as speedily and in a manner that will cause as little offense to the public sense and taste as can the contractor. They can realize considerable sums by the sale of the carcasses by being permitted to make the removal. (After quoting from authorities.) It requires no argument to show that neither a municipal or other government can take one man's property and give it to another. * * * The effect of an ordinance which does not allow the owner of a dead carcass to remove it, but requires him to pay a fee for its removal which is greater than its value, is precisely the same in effect as an ordinance which takes the carcass from one person and gives it to another."

In *State vs. Morris*, 47 La. Ann., 1664, the court, passing upon a similar ordinance, say:

> "We rest the case entirely on the ground that the owner is entitled to a reasonable time after the death of an animal to dispose of it or cart it away under the

requirements of existing ordinances. The situation and the climate may render it necessary to permit very little time and opportunity for removal. In adopting ordinances which must necessarily be general the owner may be allowed but little time (if public safety requires) for the removal of his dead animals. The authorities agree that the removal must be made as ordained, and that the courts cannot contest the manner in which it shall be done and under what sanitary condition, if reasonable. *However limited may be the right of removal it cannot be denied entirely without conflicting with the laws regulating police power.*"

Upon the foregoing authorities we submit that the ordinance here involved does violate the constitutional provision which declares that property shall not be taken without compensation.

II.

CONCEDING THE ORDINANCE HERE INVOLVED TO BE IN ALL OTHER RESPECTS CONSTITUTIONAL AND VALID, IT IS NEVERTHELESS INVALID FOR THE REASON THAT THERE IS NO AUTHORITY OF LAW WHATEVER TO SUSTAIN THE PROVISION THEREIN CONTAINED WHICH REQUIRES THE HOUSEHOLDERS OF SAN FRANCISCO TO PAY TWENTY CENTS PER CUBIC YARD FOR THE REDUCTION OF THE SUBSTANCES TAKEN FROM THEM AND GIVEN TO THE RESPONDENT BY THE ORDINANCE HERE INVOLVED.

In the circuit court of appeals we argued (Record, p. 742, pt. 7) "that there is no authority of law for the imposition of the compulsory payment of twenty cents a cubic yard upon the householders of the city and county of San Francisco."

Although it is stated in the opinion of the circuit court of appeals that this point is made by us, the proposition is nowhere considered by it.

There is no law upon this subject peculiar to California. In other words, there is no law in the State of California which in terms or by necessary or other implication authorized any municipal corporation to impose such a burden as that involved in the charge of twenty cents a cubic yard for the reduction of the substances mentioned. It is true that constitutional and statutory provisions exist in California, whereby there is conferred upon the municipalities of that State the usual powers of local police. If such powers of local police, which have been granted to nearly all of the municipalities of the country, carry by necessary implication power to impose a charge like that here involved, then such power exists; otherwise the power is entirely wanting.

As already stated, there is no legislation in California directly covering the matter here involved, and if it exists at all it must arise out of the power granted in general terms to legislate with respect to matters of local police. In that event such power has been conferred upon and inheres in practically every municipal corporation in the country.

We submit that no such power exists as an incident to the grant of the powers of ordinary local police, and that therefore there is no law in California which authorized or authorizes such a provision.

The Slaughter-house case is not authority for the imposition of the charge. The law-making power in that case was the sovereign law-making authority of the State of Louisiana, while here we have a mere municipal corporation, which has only such authority as is delegated to it by a sovereign law-making power.

There is not a single reported case which sustains the exercise by municipal authorities of such a power. There was one case cited to the point in the courts below, namely, Walker *vs.* Jamieson, 140 Ind., 591; 37 N. E., 402; 39 N. E., 869; 28 L. R. A., 679. In that case, however, in answer to a petition for a rehearing, the portion of the decision which affirmed a provision imposing a charge somewhat similar to that here involved *was expressly withdrawn.*

III.

CONSIDERED EITHER AS A CONTRACT UNDER THE POLICE POWER OR AS A FRANCHISE, THE ORDINANCE HERE INVOLVED NEVER HAD ANY LEGAL EXISTENCE FOR THE REASON THAT IT WAS NEVER LAWFULLY ENACTED.

The ordinance here involved was attacked upon the ground that it had never been passed, for the reason that it had never received the signature of the mayor of San Francisco.

The circuit court decided that the ordinance did not require the signature of the mayor for the reason that it was the grant of a franchise under the franchise act of 1893 (Stats. Cal. 1893, p. 288).

The circuit court of appeals, as already shown, put its decision upon the ground that the ordinance was a contract under the police power, and did not undertake to decide whether it was a franchise or not.

The circuit court of appeals, however, decided that the ordinance did not require the signature of the mayor, for reasons presently to be mentioned.

We now proceed to show briefly that, whether it be a contract under the police power or a franchise under the act of 1893, the ordinance failed of passage for the reason that it never received the signature of the mayor.

(a.) *Considered as a contract under the police power, the ordinance required the signature of the mayor.*

The charter of San Francisco, at the date of the passage of the ordinance here involved, provided that "every ordinance or resolution of the board of supervisors" covering the subjects of legislation, among others, which are embraced in the ordinance here involved should be passed,

then published for five days, then again passed, and receive the approval of the mayor or be passed notwithstanding his disapproval. (See Consolidation Act of the city and county of San Francisco, Stats. Cal. 1856, p. 164, sec. 68.)

This course was not followed in the passage of the ordinance here involved. The ordinance was passed to be printed, showing that the board of supervisors had in mind the necessity of passing the ordinance, printing it, passing it the second time, and then having it approved by the mayor. Indeed, the ordinance expressly provides that the grantees of the privilege conferred by the ordinance "shall within a period of ten days from the date of the *approval* of this order file with the clerk of this board their acceptance of its provisions and of this franchise" (Record, p. 15, sec. 11.)

It will be therefore seen that the board contemplated that the ordinance would ultimately be submitted to the mayor for his approval. In point of fact it never was so submitted, and it is the established law in California that under such circumstances the ordinance has no legal existence.

Eisenhuth *vs.* Ackerson, 105 Cal., 87.
Creighton *vs.* Manson, 27 Cal., 614, 630.
Spring Valley W. W. *vs.* Ashburn, 52 Cal., 62.
Pollock *vs.* San Diego, 118 Cal., 593.

This point was decided against us by the circuit court of appeals in the following language (Record, p. 758):

> "Order No. 2965 is claimed to be invalid because it was not signed by the mayor *as required by the act of* 1893, and in this connection it is claimed that the words found in the statutes of California 'by regulation or order' are synonymous with the words elsewhere used 'ordinance and resolution.' Admitting that these words may often be used to express the same meaning, it does not necessarily follow that in all cases the word 'order' is synonymous with 'ordinance,' or that the word 'resolution' is synonymous

with 'regulation.' It is enough to say that by section 1 of the act of 1863 the municipality was authorized to proceed under the police power 'by order and regulation' to do the things mentioned in order No. 2965, and Order No. 12 (second series).

"In People *vs.* Counts, 89 Cal., 15, 22, it was claimed that the board should have proceeded by ordinance and not by order. The court said: 'Conceding that the county government act for some purposes requires an ordinance, whilst for other purposes only an order is required, it is only necessary in answer to this objection, to say that for the purpose under consideration section 37 of the act requires the board to do what it is thereby required to do "by order."'"

[The circuit court of appeals was in error in saying that we had claimed that the mayor's signature was made necessary by the act of 1893. Our claim was that it was made necessary by section 68 of the charter of San Francisco, commonly called the Consolidation Act.]

The circuit court of appeals decides that the police powers of the city and county of San Francisco can be exercised by order or regulation, and that hence the provision that every ordinance and every resolution must receive the signature of the mayor does not apply to the exercise of the police power for the reason that such powers may be exercised by order or regulation. In the city and county of San Francisco during a period of forty-three years the word "regulation" and the word "order," used in the consolidation act quoted by the circuit court of appeals, have been universally understood to mean "ordinance." In that time there were no ordinances (so called) passed by the common council of that municipality, but there were adopted during that time 3,396 orders and 50,953 resolutions.

But we do not depend for our position upon this local interpretation of the terms of a local act. We claim and insist that the provision of the consolidation act which requires every ordinance and every resolution upon enumer-

ated subjects to receive the signature of the mayor is so comprehensive as to include every legislative act of which a municipal body is capable. It is established by an overwhelming array of authority that a municipal body cannot act in a legislative way except through the medium of an ordinance or a resolution. The terms "ordinance" and "resolution" have been repeatedly decided to include every species of legislative action of which a municipal corporation is capable.

The following cases decide that a municipal body cannot act in a legislative way except through the medium of an ordinance or a resolution. The terms "ordinance" and "resolution" therefore include both regulation and order.

Dey *vs.* The Mayor, &c., 19 N. J. E., 412, 416.

Moser *vs.* White, 29 Mich., 59, 60.

People of Alton *vs.* Mulledy, 21 Ill., 76, 78.

People *vs.* Schroder, 76 N. Y., 160, 162.

State *vs.* The City Council, 37 Atl., 675, 676.

Erwin *vs.* Jersey City, 37 Atl. (N. J.), 732, 734.

Schuman *vs.* Seymour, 24 N. J. Eq., 143, 153.

State *vs.* Darrow, 67 N. W. (Minn.), 1012, 1014.

Elliott's Elements of Municipal Corporations, p. 176.

Pollock *vs.* San Diego, 118 Cal., 593, 595.

McGavock *vs.* City of Omaha, 58 N. W. (Neb.), 543, 549.

Sower *vs.* Philadelphia, 35 Pa., 231, 236.

City of Crawfordsville *vs.* Braden, 130 Ind., 149; 30 Am. St. Rep., 214, 224.

Creighton *vs.* Manson, 27 Cal., 614, 629.

Chicago, &c., R. R. Co., *vs.* Chicago, 51 N. E. (Ill.), 596, 598.

City of Alma *vs.* Guaranty Savings Bank, 60 Fed., 203, 206.

(b.) Considered as a franchise granted under the act of March 23, 1893 (Stats. Cal. 1893, page 238), the ordinance required the signature of the mayor.

In its opinion upon the motion for a preliminary injunction, the circuit court (Record, pp. 169 to 171) decided that the provision requiring the signature of the mayor did not apply to the franchises granted under the act of 1893. This decision was based upon the authority of People *vs.* Board of Supervisors, 122 Cal., 421, wherein it was decided that a franchise for a wharf should have been granted in conformity to the act of 1893. The case cited, however, has no application to the point here involved. The purpose of the act of 1893 was to simply require all franchises to be sold, and was intended to prohibit their transfer upon gratuity. The very case cited by the circuit court, People *vs.* Board of Supervisors, 122 Cal., 421, 423, declares that "it has been decided by this court that the grant of a franchise was a legislative act." The franchise act of 1893 provides that "every franchise or privilege * * * proposed to be granted by the board of supervisors, common council or other governing or legislative body * * * shall be granted upon the condition in this act provided and not otherwise." Provision is thereupon made requiring the fact to be stated "that an application for such franchise or privilege has been made," and "that it is proposed to grant the same." Thereupon procedure is provided for the opening of bids and the striking off of the franchise to the highest bidder. The point in the procedure where the legislative power of the common council is called into play is when the common council determines to grant a franchise and give notice of the proposed sale. This it must do before the publication occurs, for the publication is required to state "the fact that an application for such franchise or privilege has been made" and that "it is proposed to grant the same."

It is obvious, therefore, that the board is required to deter-

mine that it will grant the franchise to the highest bidder. This action is required by the charter of San Francisco to be submitted to the mayor for his approval or rejection. There is, therefore, no theory upon which it can be decided that the act of 1893, which was intended simply for the purpose of securing the sale of franchises, had the effect of repealing a provision of the municipal charter (that requiring the signature of the mayor) which was intended to safeguard the interests of the municipality and the inhabitants thereof.

The only decision in the courts of California which we think is directly in point is one holding that an ordinance granting a railroad franchise which did not receive the signature of the mayor was never lawfully enacted. (See Eisenhuth *vs.* Ackerson, 105 Cal., 87.)

We therefore submit that, considered as the grant of a franchise, the ordinance here involved was never legally enacted, for the reason that it never received the signature of the mayor.

IV.

CONSIDERED AS A FRANCHISE, THE ORDINANCE IS INVALID FOR WANT OF POWER TO GRANT THE FRANCHISE AND FOR A VIOLATION OF THE PRESCRIBED MODE IN THE GRANTING THEREOF, IF THERE WERE POWER TO GRANT THE SAME.

(*a.*) There is no law of California under which the ordinance here involved, considered as a franchise, could have been lawfully granted. The ordinance itself purports to have been granted solely under the authority contained in the franchise act of 1893 (Stats. Cal. 1893, p. 298) hereinabove set out in full.

The act of 1893 does not pretend to authorize the granting of franchises. Its obvious purpose is to put a limitation upon the exercise of power to grant franchises conferred by other acts. The language is that "every franchise

* * * hereafter proposed to be granted * * * shall be granted upon the conditions in this act provided, and not otherwise." The conditions provided in the act are those of purchase and sale. In other words, no franchise can be voted as a gratuity. It must be sold, and sold to the highest bidder. The plain object of this statute was to limit the exercise of authority to grant franchises conferred by other acts of the legislature. It was never intended to be itself a grant of authority to vote franchises. It was an act limiting power conferred by other legislation.

It is therefore clear that, considered as a franchise, there is no authority whatever for the passage of the ordinance here involved.

(*b.*) Assuming, however, that the act of 1893 does authorize the granting of such a franchise, there is no provision therein, nor is there any provision elsewhere to be found, which authorizes the granting of an *exclusive* franchise. It is clear that authority to grant a franchise never carries with it power to grant an exclusive franchise.

Minturn *vs.* La Rue, 23 How., U. S., 435.

Citizens' Street Railway *vs.* Detroit Railway, 171 U. S., 48.

(*c.*) The grant of the franchise was invalid for the reason that it was not sold to the highest bidder, as required by the act of March 23, 1893. Merle bid $5,500. Sharon bid $2,510 and a percentage of the gross receipts. Merle was the highest cash bidder. The board of supervisors awarded the franchise to Sharon on the theory that his bid of a percentage of the gross receipts made him the highest bidder. This award was made February 17, 1896. A month later, March 17, 1896, the supreme court of California decided (Thompson *vs.* Board of Supervisors, 111 Cal., 553) that percentage bids were invalid, and that the statute required the award to be made to the highest cash bidder. The award

to Sharon was therefore void. Mode is the power of measure (Pacific Electric Company *vs.* The City of Los Angeles, 118 Fed., 746, 753, affirmed in this court April 11, 1904).

It is also clear that this point is open to us, for it is said in City of Zanesville *vs.* Zanesville Gas Light Company, 47 Ohio, 1; 23 N. E., 25, to quote from the syllabus:

> "*Wherever an incorporated company in any action asserts a right against another person, based upon an assumed franchise or power, the person against whom the right is so asserted may, as a defense, deny the existence of such franchise or power.*"

This same rule is laid down in Thompson on Corporations, section 5340.

In Waterloo Turnpike Road Co. *vs.* Cole, 51 Cal., 386, it is said:

> "But in the case at bar the point raised by the defendant is, that it affirmatively appears, from the plaintiff's evidence, that the board did not acquire jurisdiction to grant the franchise to collect tolls because of its failure to prescribe the location of gates, which was a condition precedent to the exercise of the power to grant the franchise. In other words, the proposition is, that the grant is void for want of jurisdiction in the board to make it, and not merely that the board erred in the exercise of its admitted jurisdiction. The distinction between the two cases is obvious; and it is too clear to require argument, that when the want of jurisdiction appears upon the face of the proceedings, as in this case, any one injuriously affected may avail himself of the defect, even in a collateral action."

We therefore submit that, whether it be considered as a contract under the police power or as the grant of a franchise, the ordinance here involved never had any legal existence, for the reason that it was never lawfully enacted.

V.

SOCIALISM HAS NOT BECOME SO DOMINANT A PRINCIPLE IN THE POLICE POWER THAT THE STATE CAN ASSUME OR FARM OUT A MONOPOLY OF ALL OF THE OCCUPATIONS SUBJECT TO REGULATION UNDER THE POLICE POWER.

In Iler *vs.* Ross (Neb.), 90 N. W., 961; 57 L. R. A., 895, it is decided that "scavenger work has a well accepted and defined meaning, and the occupation or business, lowly though it be, has existed and has been recognized and regulated for ages."

The proposition upon which this case was sustained in the circuit court of appeals is that the State may assume a monopoly of the occupation of collecting and destroying house refuse, and may, therefore, farm out that monopoly to "an agent of the State." This is laid down with respect to a calling which, though lowly, is an incident to civilized life in all large cities—to a calling which engages the activities and brings a livelihood to great numbers of persons. The calling is on a plane with tanning, carpet-beating, the manufacture of soap, laundering, and other similar occupations. If the State (or a political subdivision) can assume or farm out a monopoly of the occupation of collecting and destroying refuse, upon what theory can it be denied the right to assume or farm out a monopoly of tanning, manufacturing soap, carpet-beating, laundering, and other similar occupations?

Is it possible that the police power of the State has grown so great that it now embraces authority to accomplish all these results?

We claim not.

In Lawton *vs.* Steele, 152 U. S., 133, it is decided that to justify the exercise of the police power the public interest

must require the interference, and *the measures adopted must be reasonably necessary for the accomplishment of the purpose.*

In Allgeyer *vs.* Louisiana, 165 U. S., 578–589, it is held that "the right to follow any of the common occupations of life is an inalienable right."

The ordinance here involved violates, so we claim, the principles laid down in the cases cited.

We know of no case decided by this court where the authority of a State to assume or farm out a monopoly of a calling confessedly subject to police regulation has ever been considered. The case at bar sustains the exercise of such power by a municipality which has been granted no special powers upon these subjects. The decision of the circuit court of appeals therefore practically establishes that such a power exists in every municipality of the country.

We respectfully suggest that before such an application of the police power becomes imbedded in the jurisprudence of the country, the point should have the consideration and be the subject of a decision of this court.

Your petitioners therefore respectfully request that their petition for a writ of certiorari herein be granted as prayed.

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